FILED
APR 7 1924
M. S. STANSE
CLERK

No. [redacted] 31

Supreme Court of the United States

October Term, 1923

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

against

LARS DAHL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH G. BARCLAY,
Attorney for Respondent.

p. 1

A. W. Stevens, Printer, 300 Washington Street, Brooklyn, N. Y.—Main 2300

Supreme Court of the United States

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

against

LARS DAHL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Facts

The petitioner is a corporation organized under the laws of the State of New York, and engaged in business in New York City, Borough of Brooklyn, and maintains a place of business on the water front, including dry docks, and docks at which vessels under repair are moored. At this time it was engaged in the repair of a ship which was moored at its dock, and lying in navigable water.

A part of the repairs being made were to the engine and the accident which was the subject of this action happened in the course of lowering a heavy valve into the engine room. The valve was hung on tackle a few feet above the floor (composed of iron grating), of a gallery surrounding the engine room, and about thirty feet from the floor of the engine room itself. A portion of the grating flooring of the gallery, about 10 by 3 feet, directly beneath the suspended valve, had been taken up and was covered with boards.

The work of lowering the valve was being done by a gang of three or four workmen, among whom was the respondent, a mechanic's helper, under the supervision of one Kilbride, a rigger foreman.

It was necessary to have a plank to lay across this opening, which should be strong enough for the men to work upon, and Kilbride the foreman sent all of the men, including the respondent, to search upon the ship for a suitable plank, saying, "Look around and you will find some kind of a plank." The men went on this work, and some returned with unsuitable pieces. Respondent and one Kenny searching together, found a plank about 14 feet long, 6 to 10 inches wide and about 2 inches thick. Kenny said, "We will take it to the rigger (Kilbride) and see if it is all right." They brought it to Kilbride and asked him if it was all right, and he looked at it, and said, "Yes" and then directed them to lay it across the opening (124, 171).

They did so, and Kilbride stepped upon the plank, and was engaged in putting a sling upon the valve hanging above, and the respondent stepped upon the plank to assist him, when the plank suddenly broke in two, and he fell through the opening to the engine room below sustaining severe injuries. Kilbride saved himself by seizing the loose end of a rope.

The plank was apparently a new one (165), and after it broke, it was seen by Kenny to have a knot right near the edge, and on one side, which knot ran crosswise in the plank. This was mostly concealed in the wood, but *you could see about an inch of this knot that was cut off by the saw,* and then the knot ran across the plank. *The knot was noticeable at the edge for an inch or an inch and a half* (198, 199, 200).

The plank was not selected from others furnished by

the defendant, but was a single plank of unknown ownership lying on the deck. There was no testimony by the petitioner that a supply of proper material had been furnished. On the contrary, testimony was offered by the respondent that there were no other planks on the job, which testimony was excluded on objection by counsel (183, 202).

The evidence shows that there was a custom at this time and in this locality, and under the circumstances under which this plank was used, for the boss-rigger to test a new plank before using it for the first time by placing one end on some object and jumping on the plank and then turning the plank over and repeating the operation (305, 316, 317).

Some of the petitioner's witnesses, including Kilbride, admitted that this test was used, but confined it to times when the plank showed a defect (360, 373, 374, 376). Others said that if a knot appeared they would throw the plank out without a test (381). Kilbride testified that there were three knots across the plank, but that they did not show "not as he could see" (359).

The plank was not produced in Court.

POINT ONE

As the case was properly submitted to the jury under the maritime law, a writ of certiorari should be denied.

The Trial Court in a charge eminently fair to petitioner, submitted the case to the jury upon the broad question whether the petitioner was to be charged with negligence in its duty to its servant, the respondent, with respect to the use of this plank upon which he was required to work.

In the course of the charge it was said:

> "The law imposes upon a man the doing of the thing that the average reasonable man would do under similar circumstances and no more. * * * The law says that a man must comport himself in a reasonably careful manner, having in mind the general situation" (390).

The Court also called to the attention of the jury the evidence of defects in the plank used, and evidence of the custom to test a plank when it is to be used for such a purpose (410, 411).

The Court further read to the jury, Sec. 18 of the Labor Law of the State of New York (L. 1909, Ch. 36), as follows:

> "A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

And the Court stated, in reference to this law,

> "and the decisions hold that Sec. 18 of the Labor Law does not make the employer, as we term him the "master," in this case the defendant, an insurer of the scaffold—and the plank within the meaning of this law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in

> fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the right of workman who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. As I understand the law to be in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in this State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workmen to work upon. And in this case in the light of that law, you must determine whether the defendant, knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved by a fair preponderance of evidence that it acted negligently" (404 to 408).

It is therefore perfectly clear that the Trial Court sent this case to the jury, not as a statutory action founded upon this provision of the Labor Law of the State of New York, but as an action resting upon proven negligence upon the part of the petitioner, the defendant below, but allowed the jury in determining the question to take into consideration, together with the other circumstances of the case, the requirements of the local law. Among these circumstances also was the proven custom (local as far as appears, and not distinctly maritime), of testing the plank, before using it for such a purpose, and the evidence that reasonable inspection would have disclosed the defect in the plank.

Section 18 of the Labor Law of the State of New York (quoted *supra*) is a provision of law applying generally throughout the state to a person, "employing * * * another to perform labor of any kind, in the erection, repairing, altering and painting of a house, building or structure, * * *.

It is held not to create a new cause of action, as the law of the State knows as the Employer's Liability Act does, but is to be applied generally to actions between master and servant. *Maleeney* v. *Standard Shipbuilding Co.* (237 N. Y. 250); *Wilkes* v. *United Marine Contracting Corporation* (199 A. D., N. Y. 788.)

It is not directed especially to this industry of repairing ships, but a ship is held to be a "structure" within the meaning of the law. (*Madden* v. *Hughes,* 104 App. Div. (N. Y.) 101.) It is not an attempt to modify directly any maritime rule or law.

It was passed in the exercise of the police power of the State of New York to make more safe the conditions under which in modern industry, the citizens and inhabitants of the State are compelled to work.

It was a law designed to prevent accidents by requiring care in the erection of scaffolds, and other like appliances, and not designed to alter any established principle of liability. It does not as we understand alter any established principle of liability upon the part of the master. The most that can be said is that it extended the duty of the master to the safety of the appliance itself, as erected and used, whereas, *under some circumstances,* that is where the master had furnished proper materials at hand, the common law would ascribe the insufficiency of the erected scaffold to the negligence of fellow servants in the selection of proper material from that furnished, and in the work of erection.

Such a statute is of an entirely different character than the Workmen's Compensation Act, which was concerned only with establishing an exclusive system and schedule of payments for industrial casualties, and assessing them through the medium of insurance upon the industry and indirectly upon the public.

As to the effects of this section of the Labor Law upon the common law of the State of New York, it is said, in the *Maleeney* case (*supra*).

> "The principal modification of the common law is that the master is made liable even if the scaffold be defectively constructed through the negligence of fellow servants, *he, the master having furnished proper materials.*" (Italics ours.)

This is particularly required by that part of the statute which provides that such a person shall not "furnish or erect, or cause to be furnished or erected" an improper scaffold.

And in the *Wilkes* case (*supra*), the Appellate Division of this State said (page 793):

> "The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all courts, Federal and State, and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever his grade, neglects to properly perform the duty and injury results therefrom to a person to whom the master owed such duty. (*Crispin* v. *Babbitt*, 81 N. Y., 516; *Pantzer* v. *Tilly Foster Iron Mining Co.*, 91 *id.* 368; *Simone* v. *Kirk*, 173 *id.* 7.) Certainly there is nothing revolutionary in the requirement of Section 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Gombert* v. *McKay*, 201 N. Y. 27), the master's duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530) the plaintiff in the case at bar is not asserting any such statutory cause of action. His case is based upon the common law liability of the defendant. In the

> *Marino* case the late Judge O'Brien, a jurist of recognized eminence and ability, said in his dissenting opinion (p. 544). The case of *Stewart* v. *Ferguson* (164 N. Y. 553) was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe and made of unsuitable materials. That was not a case where the statute created a cause of action."

But in the case at bar there is no evidence that the defendant below furnished sufficient and proper planks, and proof that such planks were not furnished by it was upon the objection of the counsel for the defendant below, excluded (fol. 202). The testimony is that this was the only plank of suitable length and thickness to be found by a search, and it was found lying on the deck. The most favorable view from the standpoint of the master is that this single plank was furnished, or at least adopted and used. If so, it was not subjected to the usual test, and was defective, and the defect was discoverable by inspection.

It is plain that there was no foundation laid for any claim that the master had by the furnishing of sufficient proper materials discharged its entire duty, and that the insufficiency of the plank must be ascribed to want of care in selection. It is true that the evidence shows that other workmen also brought from various parts of the ship other pieces of timber, most of them not of the proper size, and these were rejected. So if we assume that the master should be credited as with furnishing several pieces of this material, it also appears that all of it was inadequate, and the plank used was proven defective.

In this respect the case differs from the case of *Maleeney* v. *Standard Ship Building Co.* (*supra*), but it is otherwise quite similar.

Under the common law of the State of New York, it would be a question of fact under the evidence, without recourse to the Labor Law, whether the master had performed its full duty. We assume that it would be the same in admiralty. So the practical effect of this provision of the Labor Law in this case is very slight and is obscure. It does not make the liability of the master "positive" or "absolute" in this case, for it was not so submitted to the jury. The plank was defective and broke, and this evidence would alone establish a *prima facie* case under the doctrine of *res ipsa loquitur,* we contend, both at common law and in admiralty. The case developed little in the way of defence, and the plank was not produced.

It seems that this is very pertinent upon the question whether a writ should be issued to review the judgment. It is clearly not a case dependent on proof of the Labor Law, and it is not a case where otherwise the recovery would be contrary to accepted principles of the common law or of maritime law.

The effect of a ruling by this Honorable Court that the Labor Law of the State of New York could not be considered in a case of a maritime tort, would be far reaching, and would enable this petitioner and others in like business to carry on this industry within the State of New York in large measure in defiance of this provision of law, and other similar provisions having for their sole aim the safety and well being of laborers. This particular statute has been in effect for about 15 years and, as was said in the *Wilkes* case (*supra*) has become a part of the common law.

Such a ruling would also create confusion in this very

industry part of which is carried on upon navigable water, and part upon the land.

The Learned Court in the *Maleeney* case (*supra*) said that it found no disagreement that the common law of the states has become the law of admiralty as it relates to master and servant. The Court was speaking of a situation like the one in this case. The local law is the natural source to draw upon in determining the measure of duty between master and servant. A tort is a wrong, a violation of duty, and it is almost impossible to define a violation of duty without consideration of local customs and laws. We do not believe that any system of law attempts to do so. The common law as administered in the State of New York considers local customs, local regulations and ordinances, as far as they do not conflict with state authority.

In this situation the local law should be applied because this private industry has not been the subject of direct Federal supervision, but the responsibility has been left to the State to regulate it as far as the relations of the master and servant are concerned.

The recent cases in this Court cited in petitioner's brief are all, or nearly all cited in the opinions in the *Maleeney* and *Wilkes* cases, the opinions in which are added to this brief for the convenience of this Court. We do not think that those cases are decisive in this case. They referred to the right of the State of New York to apply the compensation law of this State to maritime torts under the jurisdiction of the admiralty courts. It was the radical nature of such act, legislating out of existence a recovery upon principles of liability known to the Courts and substituting an exclusive recovery founded on economic theories that was the base of those decisions. We think this Honorable Court has not intimated that there is to be any change in the process by

which the maritime law has absorbed and applied common law principles and local law in cases of this character. Thus the admiralty law becomes responsive to public opinion as enacted into local statute, and being thus responsive and flexible serves its purpose, otherwise, in the absence of direct federal statute it would fall into disrepute. The petitioner's apparent conception of the maritime law of this case is that it is the common law of past decades when the defences of "detail of the work," "fellow servant" and "assumption of risk," were at their height, and that the maritime law of today is identical, as far as it limited the master's duties, with the common law before the enactment of this and other remedial statutes, and that at such favorable moment (for employers) it became petrified and impervious to the solving influence of state statute reflecting a more liberal policy of the state and locality.

We do not deny that in admiralty as at common law the master is not liable for the negligence of a fellow servant, except in a limited way, for maintenance and cure in the case of sailors. We have endeavored to show that under the circumstances of this case the negligence was that of the master, and that the failure to furnish a reasonably proper plank, whether called a place of work, an appliance, or a "scaffold" cannot be laid at the door of the servant or a fellow servant, and that it would not be so considered in admiralty.

It seems however that if the admiralty law adopted from the common law the principal that we speak of as the "fellow servant" principle, and ever applied it to a case where the master had furnished material only, and had taken no care for the safety of the erected scaffold, it should as readily adopt later statutory modifications of what was believed to be a harsh rule.

We are inclined to believe that the rule never obtained in admiralty to the extent that it did under some decisions in the common law courts of this state.

In *Atlantic Stevedoring Company* v. *Imbrovek* (234 U. S. 52), the stevedore was held liable as for the safety of the working place, when the cross beams of a hatch were caught by an ascending draft and dropped below, injuring an employee. The negligence of the master consisted of a failure to either remove the cross beams, or to fasten them with pins that were furnished. This negligence was not ascribed to fellow workmen as a detail of the work, but the responsibility was placed upon the master for its failure to furnish a safe working place.

In *Carter* v. *Brown,* 212 Fed. 393 (5th Circuit), the claimant was injured by the falling of sacks of sugar upon the deck of a river boat. The negligence consisted of the failure of officers to see that the sugar was properly piled, *i. e.,* not piled so high, or else supported from falling. This was evidently held to be a failure of the master to furnish a safe place to work and not ascribed to the failure of fellow employees to properly pile and secure the sugar.

We are unable to see that this statute in question applied to a case under the maritime law, "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (*Southern Pacific* v. *Jensen,* 244 U. S., 205, 216.)

We beg to adopt as part of our argument the opinions of the State Courts in the cases of *Maleeney* v. *Standard Ship Building Co.,* and *Wilkes* v. *United Marine Con-*

tracting Corporation, which we have annexed hereto, and thus avoid repetition as far as possible.

A case that seems to us in point is the case of *Frese* v. *Chicago, Burlington and Quincy Railroad Co.,* decided by this Court, October 15th, 1923 (adv. Op. Nov. 1st, 1923). That was a case under the Federal Employer's Liability Act, for damages for the death of an engineer, and it appeared that the deceased had violated a state statute of Missouri, which required him to bring his train to a stop before crossing the tracks of another railroad, and to surely ascertain that no danger existed. The violation of this state statute prevented a recovery, and this Court held that such statute was applicable in determining that question of negligence.

POINT TWO

The Petition does not show that certiorari is the proper remedy in this case.

The respondent respectfully submits that the writ should be denied.

Dated, New York, April , 1924.

Respectfully submitted,

RALPH G. BARCLAY,
Attorney for Respondent.

PETER MALEENEY, *Respondent*, v. STANDARD SHIPBUILDING CORPORATION, *Appellant*.

CRANE, *J.*:

The Standard Shipbuilding Corporation, the defendant in this case, is a domestic corporation doing business in Richmond county, city and state of New York. The plaintiff was in the employ of the defendant working as a sheet iron helper. On the 6th day of October, 1921, he with other laborers was engaged in making certain repairs upon the ship *Buckeye State*, lying at the shipyards of the defendant at Rosebank, Staten Island. The particular work that he was engaged in doing was the repair of a metal ventilating shaft which was erected over the engine room in the hold of the ship and extended to the deck. The ventilator had been removed and was being replaced at the time of the accident. A scaffold had been erected by a crew of riggers in defendant's employ upon which the plaintiff was obliged to work. A plank of this scaffold broke and the plaintiff fell about twenty feet to the engine room below sustaining injuries for which he brought this action.

The court, in charging the jury, referred to the New York State Labor Law (Laws of 1921, chapter 50 [Cons. Laws, chap. 31]), which provides:

"Sec. 240. Safe scaffolding required for use of employees.

"1. A person employing or directing another to perform labor of any kind in the erection, repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other mechanical contrivances which shall be so constructed, placed and operated as to give proper protection to a person so employed or directed."

Regarding this law the judge in his charge said:

"I said a moment ago something about the failure to observe a duty being negligence. There is a law in our state known as the Labor Law. Under section 18 of that law you will have to consider whether the defendant has

observed the duty which that law casts upon it. Section 18 of the Labor Law prohibits an employer from furnishing to his employees a scaffold unsafe, unsuitable or improper and which is not so constructed as to give proper protection to the life and limb of the person employed to work thereon. Under this section there is a positive prohibition laid upon the master without exception on account of his negligence or the carelessness of his servants.

"If you find that the statute has been violated, and that the violation caused the accident, you may consider the statute with all the other facts proved in determining whether the defendant was guilty of negligence."

The charge was perhaps more favorable to the defendant than it was entitled to under the decisions of this court. We have held that there was an absolute duty under this Labor Law to furnish a safe scaffold, and that the master was liable as for negligence if the scaffold proved to be unsafe and the servant were injured The principal modification of the common law is that the master is made liable even if the scaffold be defectively constructed through the negligence of fellow-servants, he, the master, having furnished proper material. (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Caddy* v. *Interborough Rapid Transit Co.*, 195 N. Y. 415.)

The defendant, of course, does not complain upon appeal that this charge was more favorable to it than it should have been. It claims, however, that the Labor Law can have no application to the case whatever as the tort is a maritime tort, governed by the admiralty law. By section 9 of the Judiciary Act of 1789, which has been continued by the Judicial Code, sections 24 and 256, the District Courts are given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

For an accident such as happened to the plaintiff in this case he could bring his action in admiralty or in the courts of this state.

It is the common-law duty of a master to furnish his servant with a proper place to work and reasonably safe

appliances; for his neglect of this duty he is liable for the resultant injury. (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 N. Y. 368.) This is also the law in admiralty, as applicable to those other than seamen. (*Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.)

Whether there be an admiralty law of master and servant separate and distinct from the common law, as it is known and applied by the states, need not be discussed, as it is neither important nor pertinent.

The fact is that admiralty does apply the common law of master and servant as it has been expounded by the common-law courts.

In *Leathers* v. *Blessing* (105 U. S. 626, 630) it was said: "Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."

And Justice HOLMES in *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149, 167) says: "But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges."

As I read the cases I find no disagreement with this statement of Justice HOLMES, that the common law of the states has become the law of admiralty as it relates to master and servant. The only disagreement which I find is in determining what that common law is, or else in its application to situations strictly maritime. (*Workman* v. *N. Y. City, Mayor, etc.*, 179 U. S. 552; *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368; *Detroit* v. *Osborne*, 135 U. S. 492.)

We start, therefore, in our discussion with the concession that for the failure of the master to provide the servant with a reasonably safe place to work and with proper appliances, an action may be brought either in the state courts or in the United States District Courts.

The law to be applied in either tribunal will be the common law; in admiralty it may be called the maritime law.

The question arises whether or not this common-law rule of masters' liability can in any way be modified by state statutes. Can a state statute, for instance, create a presumption of negligence from the happening of an accident, which I take it, would be simply modifying the rules of evidence, or shifting the burden of proof? Can it go a step further, as it evidently has done in our Labor Law, and say that employers do not fulfill their complete duty to their servants by simply furnishing them with sufficient material to build a scaffold, but that they must see to it that the scaffold when built is safe. Broadly speaking, this wipes out the fellow-servant rule as to such a construction. Are these modifications proper and enforceable in the state courts when the accident is a maritime tort? We must remember, in this discussion, that we are dealing with a domestic corporation, and with a servant working for that corporation in the state of New York.

That the right of a common-law remedy which has been saved to suitors is not limited to either the substantive or remedial law, as it was in 1789, has heretofore been decided. Referring to the case of *Steamboat Company* v. *Chase* (16 Wall. 522) Mr. Justice BROWN in *Knapp, Stout & Co.* v. *McCaffrey* (177 U. S. 638, 646) said: "Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at that time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was held to be unsound."

In *The Hamilton* (207 U. S. 398, 404) we find this stated as the opinion of the Supreme Court: "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. * * * And as the state courts in their

decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature."

That the common law applicable to martime torts may be modified by state statutes to a certain extent and within reasonable limitations, seems to be unquestioned. The extent of the modification, however, has been much questioned of late, and has given rise to much uncertainty.

We have, upon the one hand, the *Jensen* case (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215) which holds that a state statute wiping out the master's common-law liability for injuries to his servant resulting from negligence, and substituting therefor the Workmen's Compensation Law, passed the limit of legality and was unconstitutional.

This case settled the state's power over maritime torts so far as the Workmen's Compensation Law was concerned, but made no attempt to fix the limits of that power. In fact, Mr. Justice McReynolds, writing the opinion, so intimates, for he frankly states: "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNeil*, 13 Wall, 236, 242; and the right given to recover in death cases, *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138. See *The City of Norwalk*, 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, *The Moses Taylor*, 4 Wall. 411; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 534; *The Glide*, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke*, 189 U. S. 185. See *Workman* v. *New York City*,

179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself." (This was followed by *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.)

On the other hand, in the *Garcia* case (*Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240) we find modifications of the common law by state statute adopted and applied in admiralty. While the previous cases of *Steamboat Co.* v. *Chase* (*supra*) and *Sherlock* v. *Alling* (93 U. S. 99) had sustained recoveries in a state court for negligence causing death in a maritime tort, the *Garcia* case determined for the first time that the same modification of the common law would be followed in admiralty. In the opinion we find it stated: "How far this rule of nonliability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced."

Referring to the *Jensen* and the *Stewart* cases the court continues: "We have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed."

At common law there was no recovery for death due to negligence. State statutes have modified this common-law rule by giving a cause of action to the representatives of the deceased. This, in my opinion, is more than a mere change in remedy or a method of procedure. It is the giving of a substantial right. The reason it is recognized in admiralty is because it in no way interferes with the general scheme and scope of the admiralty law or the purposes which require that law to be uniform in

all jurisdictions. It will not do to call these death statutes mere modifications of remedy as they are not such in fact. This is evidenced by the rule in the *Garcia* case that the time limited within which to bring the death action is a part of the right, and not the remedy and will be given force and effect in the admiralty courts. We find it there stated: "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (Quoting from *The Harrisbury,* 119 U. S. 214.)

Again as evidencing that the death statutes deal with something more than the remedy, we find the admiralty courts following the state courts as to contributory negligence in such cases, and holding contrary to their customary rule, that as contributory negligence bars recovery in a state court, in an action to recover for death from negligence, so likewise will contributory negligence bar recovery in the admiralty court. (*City of Norwalk,* 55 Fed. Rep. 98, 102.)

Turning to this case, the *City of Norwalk,* cited with approval both in the *Jensen* case and the *Garcia* case, we find the limitation upon the state's legislative activity well expressed as follows: "This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the Supreme Court has been that in this field of 'border legislation,' state laws are valid until Congress interposes, and thereby excludes further state legislation."

Thus our Labor Law was not made especially applicable to ships or to the local waters, but applies to all

employers furnishing scaffolds on buildings or structures within state territory. The defendant is a domestic corporation subject to the laws of the state of New York. The plaintiff was its servant and the accident happened here.

Can it not be claimed with much reason that this law passed in the interests of the laboring man for the erection of safe scaffolding was part of the police power of the state for the preservation of the life and health of its citizens, and was as applicable, therefore, to work upon a ship in the harbor, performed by resident master and servant, as upon any other structure? I think so, and for this reason believe that the Labor Law referred to has modified and supplemented the common law of master and servant within the limits permitted by the United States Constitution, and that it is applicable to such a marine tort as we have in this case.

Whether the admiralty courts will enforce this Labor Law, we, of course, cannot determine. Our power, however, to give force and effect to our own statutes, is not entirely dependent upon what they may do, (*Steamboat Co.* v. *Chase, supra; Sherlock* v. *Alling, supra.*) (See in point *Schwede* v. *Zenith Steamship Co.,* 216 Fed. Rep. 566; 244 U. S. 646.) Schwede was a seaman.

Another question has arisen in this case which, because of the authorities in the United States Supreme Court has proved quite troublesome to the state courts. It is the question of contributory negligence as a bar to recovery. According to the common law contributory negligence of a plaintiff bars recovery; in admiralty it may merely reduce or apportion the damage. The court, in charging the jury in this case, said: "Here is a provision of the maritime law which is peculiar, and I will ask you to pay strict attention while I am charging you on it. Contributory negligence of the injured party may not defeat a recovery entirely. It goes to the cause of the injury. It may be sufficient to defeat the recovery. It may require a reduction or an apportionment of the damages.

"It is for you to say whether the acts of the plaintiff were such as to relieve the defendant from liability or partial liability; and if partial liability, to what extent.

You will apply that rule. That means that you can apportion the negligence, if you find there is negligence on both parties; that you can apportion the negligence between the parties, and arrive at your verdict on an apportionment basis, if you so determine."

This is the rule applicable in the admiralty courts as decided in *The Max Morris* (137 U. S. 1, 15).

"We think," said the court in that case, "this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

Note that the rule is applied to cases prosecuted in admiralty. When a collision case was prosecuted in the state court a different rule was applied. (*Belden* v. *Chase,* 150 U. S. 674, 691.) Two vessels collided in the Hudson river. An action was brought in the New York State Supreme Court to recover for the injuries sustained by one of the vessels. It was claimed that the plaintiff's ship was guilty of negligence, contributing to the accident. The common-law rule that contributory negligence bars recovery was held to be applicable. The court said:

"The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and this country. *The Max Morris,* 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.,* 21 Wall. 389.

"In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

It has been, therefore, distinctly held that in admiralty the comparative negligence rule applies, while in the state courts the common-law rule of contributory negligence bars recovery. The cases of *Johnson & Co.* v. *Johansen* (86 Fed. Rep. 886); *The Lackawanna* (151 Fed. Rep. 499; *Carter* v. *Brown* (212 Fed. Rep. 393), were actions in admiralty.

The Circuit Court of Appeals for the Second Circuit in *Port of New York Stevedoring Corporation* v. *Castagna* (280 Fed. Rep. 618) has applied the rule laid down in the *Max Morris* case (*supra*) to an action at law. We feel that we should follow the rule of the Supreme Court of the United States in *Belden* v. *Chase,* until that court modifies or limits the authority. We do not find that it has ever been overruled. It was applied by this court in *N. Y. Harbor Tow-Boat Co.* v. *N. Y., L. E. & W. R. R. Co.* (148 N. Y. 574).

The Appellate Division also in *Kennedy* v. *Cunard Steamship Company, Limited* (197 App. Div. 459) held that the rules relating to contributory negligence must be determined by the maritime law and not by the common law. This followed, so its opinion states, the determination in *Chelentis* v. *Luckenbach Steamship Company, Inc.* (247 U. S. 372). The distinction, however, the Appellate Division failed to notice, between seamen and the ordinary land servant temporarily working on a ship, such as a stevedore, painter or mechanic. The law of the *Chelentis* case, *The Osceola* (189 U. S. 158) and *Carlisle Packing Co.* v. *Sandanger* (259 U. S. 255) was applied to the peculiar relationship existing between the members of the crew of a vessel and the owner.

The nature of a seaman's contract is such that unless the vessel be unseaworthy or there be a failure to supply and keep in order the proper appliances appurtenant to a ship, a seaman for an injury received is only entitled to his maintenance and cure and to his wages, at least so long as the voyage is continued. For disobedience to orders he may be locked up or put in irons. These rules of maritime law, applicable to seamen and members of

the crew, and so restricted by these decisions, have no application to shore servants working on docked ships. The instances where such servants, like stevedores, have recovered damages for injuries received through negligence while working on ships are so numerous both in admiralty and in the state courts that citations are unnecessary.

The common-law remedy, which as above stated, was saved to suitors by the Federal Judicial Act, included this rule that contributory negligence barred recovery in an action by a servant against his master. We are inclined to follow this common-law rule not only because the United States Supreme Court has said that it is the law to be applied in state courts, but also because a contrary rule would work the following absurdity. It has been held that in actions to recover damages for death caused by negligence, arising out of maritime torts, contributory negligence will bar recovery. (*City of Norwalk, supra; Quinette* v. *Bisso,* 136 Fed. Rep. 825, 838; *Groonstad* v. *Robins D. D. & R. Co.,* 236 N. Y. 52.) If, therefore, the comparative negligence rule of contributory negligence were to apply to actions in state courts for a maritime tort, we would have this situation. In an action brought against an employer by an employee for negligence arising out of a maritime tort, the comparative negligence rule would apply; if the employee were killed, his contributing negligence would absolutely bar recovery by his representatives.

No doubt the inconsistency may arise in the admiralty courts. This merely illustrates that if the law of contributing negligence as applied by the state courts and the admiralty courts differ, it is one of those differences which is apt to arise in all litigation where resort may be had to different tribunals. Law and its procedure is not an exact science. Given the same facts and circumstances, the same result cannot be guaranteed in law as it usually can be in natural science.

The inequalities which result to litigants at times in the application of different laws in different jurisdictions is not more serious than those differences in result which are due to human agencies, such as judges and jurors in attempting to apply a uniform law.

Believing, therefore, that the common-law rule of contributory negligence should have been charged in this case, we are obliged to reverse the judgments of the courts below and grant a new trial.

HISCOCK, *Ch. J.*, HOGAN, CARDOZO and ANDREWS, *JJ.*, concur; POUND and MCLAUGHLIN, *JJ.*, dissent.

Judgments reversed, etc.

JOHN WILKS, *Appellant*, v. UNITED MARINE CONTRACTING CORPORATION, *Respondent*.

Second Department, February 3, 1922.

KELLY, *J.*:

The plaintiff, a painter, residing in the city of New York, commenced this action against his employer, the defendant contracting corporation, organized under the laws of the State of New York, to recover damages for personal injuries caused by the breaking of a scaffold furnished by defendant upon which plaintiff and another painter were working. The accident occurred between decks on a steamship moored to a dock in the city of New York. Through the collapse of the scaffold plaintiff fell to the flooring or deck, a distance of some twenty feet, and was injured. There was evidence that the "riggers" in erecting the scaffold used a defective timber which they found on the floor of the hold, and that this timber broke under the weight of the plaintiff and his companion. On the other hand, the defendant contended that the timber had been tested and was safe.

The complaint stated a common-law cause of action against the defendant, alleging that it was negligent in providing an unsafe place for plaintiff and in furnishing him with unsafe and insufficient appliances by reason of which negligence he was injured without fault on his part.

The learned trial justice submitted the case to the jury in a charge in which he told them that plaintiff must prove negligence on the part of the defendant and absence of contributory negligence. He told the jury that the law imposed a duty on the defendant to furnish its

employee with a safe place in which to work. The plaintiff claimed that the scaffold in question was erected by a gang of "riggers" employed by defendant for that purpose, and the learned trial justice submitted to the jury the question whether these "riggers" were fellow-servants of the defendant, and told them that if they were fellow-servants and the accident happened through their fault and was not in any way due to the fault of the defendant, the plaintiff could not recover. The plaintiff excepted to the application of the fellow-servant rule. The trial justice also charged the jury at defendant's request, that if the defendant furnished a proper and sufficient amount of material for scaffolding which was available on the day in question to the co-servants of the plaintiff who were engaged in the construction of the scaffold, and said servants instead of availing themselves of such material so offered for their use chose to take a board or plank which was a part of the ship and use that in the construction of the scaffold, in such case the negligence was that of a fellow-servant for which the defendant was not liable. To this instruction plaintiff also excepted. The learned trial justice also refused the plaintiff's requests that he should instruct the jury that the plaintiff was entitled to the protection of the safety provisions in section 18 of the Labor Law of the State of New York,* which prohibit an employer from furnishing to his employees scaffolding which is unsafe, unsuitable or improper or which is not so constructed as to give proper protection to the life and limb of a person employed to work thereon. The plaintiff excepted to such refusal to charge.

The jury found a verdict for the defendant, and the appeal brings up the question, hitherto undecided as far as I can ascertain, whether the safety provisions of the statute referred to are available to a plaintiff in an action based on the common-law remedy saved to suitors in maritime cases where the common law is competent to give it.

In the case of *Atlantic Transport Co.* v. *Imbrook* (234 U. S. 52) the defendant in error was one of a gang of stevedores stowing cargo in a vessel. He was injured

*Now Labor Law (Consol. Laws, chap. 31; Laws of 1921, chap. 50), § 240, subds. 1, 2.—[REP.]

through the negligence of his employer, the plaintiff in error, which had the contract to load the vessel. He filed a libel in admiralty against the shipowner and also against his employer. The District Court dismissed the libel as to the shipowner, but held that the libellant could recover in admiralty against his employer for the reason that the tort complained of was maritime in character. (*Imbrovek* v. *Hamburg-American Steam Packet Co.*, 190 Fed. Rep. 229.) The district judge refused to follow the decision in *Campbell* v. *Hackfeld & Co.* (C. C. A. 9th Circuit, 125 Fed. Rep. 696), where it was held that admiralty had no jurisdiction in an action between the employee and the contracting stevedore, and held that the jurisdiction of admiralty depended upon the locality of the tort. The decision of the District Court was affirmed by the Circuit Court of Appeals, 4th Circuit (193 Fed. Rep. 1019), and in the Supreme Court of the United States (234 U. S. 52). Mr. Justice HUGHES, writing for the Supreme Court, said that while the precise scope of admiralty jurisdiction is not a matter of " 'obvious principle or of very accurate history,' " and "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. * * * The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty." The law as declared in the *Imbrovek* case was later applied in *Southern Pacific Co.* v. *Jensen* (244 U. S. 205), where Jensen, a stevedore, was killed while engaged in loading a steamer belonging to his employer, the plaintiff in error. His widow and children obtained an award under the Workmen's Compensation Law of the State of New York (Consol. Laws, chap. 67) and the award had been sustained by the Court of Appeals. (*Matter of*

Jensen v. *Southern Pacific Co.*, 215 N. Y. 514.) But the Federal Supreme Court held that the Workmen's Compensation Law of the State of New York conflicted with the general maritime law to such an extent as to render it invalid. The court held that the Compensation Law worked material prejudice to the characteristic features of the general maritime law and interfered with the proper harmony and uniformity of that law in its international and interstate relations. The court said: "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." This doctrine was reaffirmed in *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149). And the Court of Appeals following these decisions has decided that the Workmen's Compensation Law is inapplicable in the case of maritime contracts. (*Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37; *Matter of Doey* v. *Howland Co.*, 234 id. 30; *Matter of Anderson* v. *Johnson Lighterage Co.*, Id. 539; *Matter of Keator* v. *Rock Plaster Mfg. Co.*, Id. 540.)

In *Kennedy* v. *Cunard Steamship Co., Ltd.* (197 App. Div. 459) this court, in the First Department, discussed the saving clause in the Judiciary Act of 1789, section 9, as continued in the Judicial Code, sections 24 and 256, and cited numerous decisions in the Federal Supreme Court relating to the subject, and said: "These cases settle the law to be that actions *in rem*, whether arising under the general maritime law or to enforce liens given by the United States or local State statutes, must be prosecuted in admiralty in the United States courts, while actions *in personam*, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of the United States court or in a State court having an appropriate common-law remedy. It is the right sanctioned by the maritime law that may be enforced by any court having jurisdiction of the parties

or the *res* by the common-law remedies appropriate thereto. This clause gives a right of election of a forum for the enforcement of the maritime right or to remedy the maritime wrong and thereby allows election of the procedure, whereby the matter may be decided. But the complaining party has no right of election to determine whether the defendant's liability shall be measured by common-law standards rather than by those of the maritime law. (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 383). The maritime law as fixed and determined by the acts of Congress and the general maritime law as accepted by the Federal courts constitute part of the national law applicable to matters within the admiralty and maritime jurisdiction. The rights and liabilities arising out of maritime contracts or maritime torts, as recognized and declared by the maritime law, cannot be changed by State statute, nor by substitution of a common-law right or liability.

"The insant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore, the action may be brought in our Supreme Court, the rules of practice, pleading and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow-servants, and the measure of recovery must be determined by the maritime law and not by the common law."

But I have grave doubt whether the safety requirements in section 18 of the New York Labor Law come within the ban of these decisions. The plaintiff in this case is not asserting a claim against the ship or the shipowner. He is suing his immediate employer, a domestic contracting corporation, for damages occasioned by its failure to supply him with a safe scaffold. We are not considering any such novel, unusual statutory liability as that imposed by the Workmen's Compensation Law. We are not considering any change in the liability of the master under the employers' liability provisions of the State Labor Law. The question in the case at bar relates solely to the Labor Law, section 18, which enlarged the duty of the master or employer and extended it to responsibility for the safety of the scaffold itself and thus

to want of care in the details of its construction. (*Stewart* v. *Ferguson*, 164 N. Y. 553, 555.) Compliance with the provisions of the Employers' Liability Act (Labor Law, §§ 200-204; now Employers' Liability Law [Consol. Laws, chap. 74; Laws of 1921, chap. 121] §§ 1-7) is not essential to an action for injuries based upon a violation of the provisions of section 18. (*Williams* v. *Roblin*, 94 App. Div. 177.) It seems to me the benefit secured to the employee by section 18 is part and parcel of the common-law remedy. The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all courts, Federal and State, and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever be his grade, neglects to properly perform the duty and injury results therefrom to a person to whom the master owed such a duty. (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzor* v. *Tilly Foster Iron Mining Co.*, 99 id. 360; *Simone* v. *Kirk*, 173 id. 7.) Certainly there is nothing revolutionary in the requirement of section 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson, supra; Gombert* v. *McKay*, 201 N. Y. 27), the master's duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530), the plaintiff in the case at bar is not asserting any such statutory cause of action. His claim is based upon the common-law liability of the defendant. In the *Marino* case the late Judge O'Brien, a jurist of recognized eminence and ability, said in his dissenting opinion (p. 544): "The case of *Stewart* v. *Ferguson* (164 N. Y. 553) was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe or made of unsuitable materials. That was not a case where the statute created

a cause of action." In the case at bar neither the plaintiff nor his fellow-painters using the scaffold had any part in its construction. The only thing they did was to paint. The scaffold was erected by "an extra gang" picked for the exclusive purpose of rigging the scaffolds.

That the general maritime law may be modified by State statutes in cases where such modifications will not work "material prejudice to the characteristic features of the general maritime law [nor interfere] with the proper harmony and uniformity of that law in its international and interstate relations" has been expressly declared by the Supreme Court of the United States. This is conceded in the prevailing opinion of Mr. Justice McReynolds in *Southern Pacific Co.* v. *Jensen* (*supra*, 216), and reiterated by the same learned judge in *Western Fuel Co.* v. *Garcia* (decided December 5, 1921, —— U. S. ——; N. Y. L. J. Dec. 27, 1921).

I cannot see how this humane statutory requirement expressive of the public policy of the State of New York, designed for the protection of the life and limb of laborers upon scaffolds, introduces any new principle of substantive law. True, it is enforceable only in the State of New York, but in its application to an action by an employee residing in the city of New York working for the time being in painting a vessel moored to a dock in the city of New York, against his employer, a domestic contracting corporation, I cannot see how it offends any of the essentials referred to by Mr. Justice McReynolds in *Western Fuel Co.* v. *Garcia* (*supra*). It does not interfere with the harmony or uniformity of the maritime law because the litigants are both residents of the State of New York. The defendant is not a shipowner whose vessel may be in one jurisdiction to-day and in another to-morrow. The plaintiff is not a sailor or one of a crew who may assert alleged causes of action in divers jurisdictions. Employers of labor in all jurisdictions are required by the common law to furnish their employees with safe tools and appliances and scaffolds. In the State of New York the statute, section 18, declares the rule, and as to work performed in that State prohibits employers from furnishing unsafe scaffolds. It takes from the employer no defense which he might plead in any court in

any jurisdiction save that it makes the duty absolute and prevents him from pleading that the scaffold was built by a fellow-servant of the injured employee, and that he, the master, is thus discharged from liability. If such defense may be invoked under the maritime law in a suit against a vessel or a vessel owner, the enforcement of such a salutary regulation is not, it seems to me, to be condemned in an action like the present controversy between two residents of the State relating to the performance of work within the State. In my opinion, the Court of Appeals has not decided to the contrary in any of the cases cited. The Supreme Court of the United States has said in the *Jensen Case* (*supra,* 216) that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by State legislation," but cites the opinion of Mr. Justice BRADLEY in *The Lottawanna* (21 Wall. 558, 575): "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." Judged by this standard I can see nothing in the enforcement of this safety requirement between the litigants in the case at bar which "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (*Southern Pacific Co.* v. *Jensen, supra,* 216.)

"Actions to recover damages for the breach of a statutory duty are not to be confounded with those based solely on negligence. In the latter class of cases the violation of a statute or an ordinance, if it has some connection with the injuries complained of, is evidence, more or less cogent, of negligence which the jury may consider with all the facts proved." (*Amberg* v. *Kinley,* 214 N. Y. 531, 536, citing *Union Pacific R. Co.* v. *McDonald,* 152 U. S. 262, 283; *Hayes* v. *Michigan Central R. R.*

Co., 111 id. 228, 239; *Kelley* v. *N. Y. State Railways*, 207 N. Y. 342; *Fluker* v. *Ziegele Brewing Co.*, 201 id. 40.)

We think that in the case at bar the plaintiff was entitled to have the jury informed of the existence of the statutory prohibition against unsafe scaffolds, and instructed that if they found that the statute had been violated and that the violation had caused the accident, they might consider the statute with all the other facts proved in determining whether defendant was guilty of negligence. We also think the defendant was entitled to have the jury instructed that section 18 is a positive prohibition laid upon the master without exception upon account of his ignorance or the carelessness of his servants.

We think the exceptions present reversible error and that the judgment should be reversed and a new trial granted.

BLACKMAR, *P. J.*, and JAYCOX, *J.*, concur; RICH and MANNING, *JJ.*, dissent and vote to affirm.

Judgment and order reversed and new trial granted, with costs to abide the event.

SUBJECT INDEX

PAGE

Statement 1

Argument 1

Point One. The charge of the Trial Court was in substance a submission of the case under principles of the maritime law governing the situation, and the consideration given to the Labor Law of the State of New York, Sec. 18, did not have the effect of enlarging duties of the plaintiff-in-error or curtailing its defences..... 7

Point Two. The statute in question was provable in this action..... 15

Point Three. The writ of error should be dismissed. 21

Point Four. The judgment should be affirmed on the merits 21

INDEX TO CASES CITED

PAGE

Butler v. Townsend, 126 N. Y. 105 14

Dahl v. Robins Dry Dock and Repair Co., 1st trial, 203 A. D. (N. Y.) 792 8

Frese v. Chicago, Burlington and Quincy R. R. Co., U. S. Adv. Opin. Nov. 1st, 1923 20

Grant and Smith Porter Co. v. Rohde, 257 U. S. 469. 16

Heiser v. Cincinnati Abattoir Co., 205 N. Y. 379, 98 N. E. 743 14

Imbrovek v. Atl. Transport Co., 190 Fed. 239, affd. 234 U. S. 52 19

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 16

Maleeny v. Standard Ship Building Co., 237 N. Y. 250 ..... 10, 14, 21

Martin v. Herzog, 228 N. Y. 164 8

Schwede v. Zenith Steamship Co., dist. 244 U. S. 649. 21

Southern Pacific Co. v. Jensen, 244 U. S. 205 16

State of Washington v. Dawson, U. S. Adv. Opin. March 15th, 1924, pg. 339, Case No. 366 16

Western Fuel Co. v. Garcia, 257 U. S. 233 17

Wilkes v. United Marine Cont. Co., 199 A. D. (N. Y.) 788 9

Supreme Court of the United States

OCT. TERM, 1924.

No. 316.

ROBINS DRY DOCK AND REPAIR COMPANY, *Plaintiff-in-error,* vs. LARS DAHL, *Defendant-in-error.*	On writ of error to the Supreme Court of the State of New York for the County of Kings.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANT-IN-ERROR

Statement of the case

The statement of the case made in behalf of the plaintiff-in-error, does not present clearly certain features which are important from the standpoint of the defendant-in-error.

Robins Dry Dock and Repair Company is a domestic corporation organized under the Laws of the State of New York (p. 5, transcript). Lars Dahl was in its employ as a mechanic's helper (pp. 15-16, transcript). On February 2nd, 1920, repair work was being done by the said employer upon a ship "El Occident". This ship as

matter of fact (although the record does not appear to show it) was laying in navigable water, and was moored to the employer's dock in the City of New York, Borough of Brooklyn, within the territorial limits of the State of New York and of said City and Borough.

A part of the repairs being made were repairs to the engine, and the accident happened in the course of lowering a heavy valve into the engine room. The valve was hung on tackle a few feet above the floor (composed of iron grating), of a gallery surrounding the engine room, and about thirty feet above the floor of the engine room. A portion of this grating floor of the gallery, about 10 by 3 feet, directly below the suspended valve, had been taken up, and was covered with boards (p. 16, transcript).

The work of lowering the valve was being done by a gang of three or four workmen, among whom was the defendant-in-error, a mechanic's helper, under the supervision of one Kilbride, a rigger foreman (pp. 16-34, transcript).

It was necessary to have a plank to lay across this opening, which was strong enough for the men to work upon, and Kilbride, the foreman, sent all of the men, including the defendant-in-error, to search upon the ship for a suitable plank, saying, "Look around and you will find some kind of a plank." The men went on this errand, and some returned with pieces that were unsuitable and short which they brought to the rigger boss Kilbride, and he rejected them (pp. 17-34, transcript). Defendant-in-error and his fellow servant Kenny, searching together on the aft part of the ship under the specific order of Kilbride, found a plank about 14 feet long, 8 to 10 inches wide, and about 2 inches thick (pp. 17, 35 transcript). It appeared to be a new plank and

they saw nothing defective about it although it does not appear that they subjected it to anything more than a casual look (transcript, p. 29). Kenny said, "We will take it to the rigger, (Kilbride) and see if it is all right" (p. 38, transcript). They brought it to Kilbride and asked him if it was all right, and he looked at it, and said, "Yes" and then directed them to lay it across the opening (transcript, pp. 18, 29, 34).

They did so, and Kilbride stepped upon the plank, and was engaged in putting a sling upon the valve hanging above, and the defendant-in-error stepped upon the plank to assist him, when the plank broke in two, and he fell through the opening to the engine room below, and sustained severe injuries. Kilbride saved himself by seizing the loose end of the rope (transcript, p. 18).

After the plank broke the pieces were seen by Kenny who testified that it had a knot right near the edge and on one side, which ran crossways in he plank. This was mostly concealed by the wood, but you could see about an inch of this knot that was cut off by the saw. The knot was noticeable at the edge of the plank for an inch or an inch and a half (transcript, pages 35, 39, 40).

The plank was not selected from others furnished by the employer, but was a single plank laying on the deck. There was no testimony by the plaintiff-in-error that a supply of proper materials had been furnished. On the contrary testimony was offered by the defendant-in-error, that there were no other planks on the job, which testimony was objected to by counsel for the plaintiff-in-error, and was excluded on such objection (transcript, pp. 32, 36).

The evidence further shows that there was a custom at this time, and in this locality, and under the circumstances under which this plank was used, for the boss

rigger to test a new plank before using it for the first time, by placing one end on some object and jumping on the plank and then turning it over and repeating the operation (transcript, pp. 56, 57, 58, 61).

Some of the petitioner's witnesses, including Kilbride, admitted that this test was used, but confined it to times when the plank would show a defect (transcript, 70, 72, 73). Others said that if a knot was visible they would throw the plank out without a test (transcript, p. 74). Kilbride testified for the plaintiff-in-error that there were three knots across the plank, but that they did not show, "not as he could see (transcript, p. 69).

The plank was not produced in Court.

The points in the evidence which we wish to make clear are, that there was no quantity of suitable material, or planks furnished by the master, out of which selection could be made, but that this one plank was the only one, suitable even as to length which was to be found upon the ship, after search both forward and aft. That it was not "selected" by the servant or by his fellow servants, but was taken to the boss rigger, and used as an appliance upon his orders. That it contained a defect discoverable by reasonable inspection. That no proper inspection was made by either the boss rigger or anyone representing the master, nor was the test, shown to be customary under the circumstances, applied.

We think under this evidence that the statement that the defendant-in-error and his fellow servant Kenny "finally selected the plank" is very misleading (p. 16, brief). Likewise is the statement that "The plank finally selected was one chosen by the injured man himself and his companion" (p. 6 of brief). This is repeated (p. 7 of brief) when it is said that "examination of the oral testimony" * * * shows conclusively that the plank "*se-*

lected by the defendant-in-error himself, was apparently suitable for the purpose for which it was used, etc."

We call attention to these statements in the evidence because they might lead the court to infer that the proof showed that the master had performed its duty of furnishing proper material and that there was negligence of the servant and his fellows in selecting an unsound plank rather than a sound one.

Upon this evidence the case was sent to the jury under a charge which we claim amounted in substance to a submission upon principles common to the maritime law and to the common law, and which were not modified in substance by mention and consideration of the State Statute known as the Labor Law, relating to scaffolds.

Over one half the charge is devoted to a careful exposition of the law of negligence to be applied to the situation.

The Court then speaks of the application of "maritime law" to this case, saying, "But the maritime law is applied and those maritime laws are known by lawyers as the common law" (p. 78, transcript) and the same rules apply that the burden is on the plaintiff to prove that the defendant was negligent and he himself free from contributory negligence."

The Court then read the Labor Law (transcript, p. 78, fol. 134) and said that decisions held that it did not constitute the master an insurer of the safety of the scaffold, and continued

> "* * * "it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can

modify or affect the rights of workmen who are operating under the maritime law. And it has been held that (fol. 135) this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant, knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict. If he did something that contributed to the injury, then he is not entitled to a verdict."

The Court then reviewed the evidence, saying that neither the plaintiff nor his fellow servant Kenny or the boss rigger Kilbride saw from what observation they made, any defect in the plaink. The evidence of the custom to test an unused plank or new plank under such circumstances, is also mentioned and the question whether there was negligence in that regard is left to the jury (transcript, p. 80, fol. 137).

Counsel for the plaintiff-in-error then excepted to that part of the charge applying Sec. 18 of the Labor Law to the case, and to the reading of the law (transcript, p. 82, fol. 141).

POINT ONE

The charge of the Trial Court was in substance and effect a submission of the case under principles of the maritime law governing the situation, and the consideration given to the Labor Law of the State of New York. Sec. 18 did not have the effect of enlarging the duties of this plaintiff-in-error or curtailing its defences.

It seems that the very first point to consider in this case is whether the Labor Law, as charged in this case, and as applied to the circumstances, made any real change in the principles of law to be applied. If it did not, then it is entirely immaterial whether it could, under some circumstances, and construed in some manner, so modify the principles of the maritime law, as to be repugnant to constitutional provisions. We contend, having regard to substance rather than form, the jury were no differently charged in this case than justified by principles of maritime law irrespective of such statute.

The plaintiff-in-error contends that he is prejudiced because, the duty of the master to the servant in respect of the furnishing of a proper plank is by the statute made an absolute one, whereas under maritime or common law it is limited to the exercise of reasonable care (pp. 27 and 28, brief of plaintiff-in-error).

We have no inclination to deny that in some situations the statute may be so construed and applied as to make the duty of the master dependent upon the question

whether the appliance was in fact a proper one, rather than upon the question whether the master had used due care. There are in New York State conflicting decisions as to the effect of a violation of a statute, or local ordinance, in an action of tort (See *Martin* v. *Herzog,* 228 N. Y. 164). But the decision in the case at bar is expressly confined to the proof of the statute as some evidence that the acts complained of constituted negligence. And the decisions in this state in respect of the materiality of this statute in an action for a maritime tort have gone no further than to hold that the violation of the statute may be considered by the jury as evidence of negligence.

Indeed upon the first appeal of this case at bar the plaintiff's judgment was reversed and a new trial ordered upon the ground that the Trial Court had submitted the case to the jury upon the theory that the violation of the statute was itself the tort and of itself was sufficient to support a verdict, rather than that it was only evidence to be considered in determining the question of defendant's conduct measured by the rule of negligence.

The Court there said (*Dahl* v. *Robins Dry Dock and Repair Co.,* 203 App. Div. 792, 795):

> "I think the learned trial justice overlooked the fact that, as a maritime case, plaintiff's right to recover could not rest solely on the Statute, irrespective of defendant's negligence. It must be determined under common law rules. It was the duty of the plaintiff to prove as alleged in the complaint, that defendant was negligent. In determining that question we have decided that the jury might consider the safety requirements of the state statute, but we never decided that the state statute alone justified recovery in a maritime case, because any such construction would offend the rule that the maritime law cannot be modified by

> state statutes so as to work material prejudice to its characteristic features. The right saved to the plaintiff in the State court was his common-law action for negligence."

The same situation existed in the case of *Wilkes* v. *United Marine Contracting Corporation* (199 App. Div. N. Y. 788) in which case the learned Presiding Justice (Kelly, P. J.) also wrote the opinion. That case involved the collapse of a completed scaffold erected for plaintiff's use and in which a defective timber had been used.

It is there said (p. 193):

> "It seems to me the benefit secured to the employee by Sec. 18 is part and parcel of the common law remedy. The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all Courts, Federal and State and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever be his grade, neglects to properly perform the duty, and injury results therefrom to a person to whom the master owed such a duty (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 *id.* 360; *Simone* v. *Kirk*, 173 *id.* 7). Certainly there is nothing revolutionary in the requirement of Sec. 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson, supra; Gombert* v. *McKay*, 201 N. Y. 27), the masters duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530) the plaintiff in the case at bar is not asserting any such statutory cause of action. His claim is based upon the common law liability of the defendant."

And in *Maleeny* v. *Standard Shipbuilding Corporation* (237 N. Y. 250) the charge of the Trial Court was:

> "If you find that the statute has been violated, and that the violation caused the accident, you may consider the statute, with all the other facts proved in determining whether the defendant was guilty of negligence" (see page 253).

The defendant-in-error contends under this point, that *in this case* the liability of the employer has not been broadened by the limited application of the statute, and shows that the violation of the statute was only evidence of negligence under the charge to the jury.

The statute prohibits the master from furnishing, in this case, a plank (called a scaffold) which was "unsafe, unsuitable or improper". If that is translated to positive form it is that he is required to furnish a plank which is "safe, suitable and proper."

Is the duty of the master something less under the maritime law? It may be said that he is only required to use reasonable care to that end.

But under the charge in the case at bar the master has not been required to perform, at all events, his statutory duty, but only to exercise due care in that respect, that is not to fail through his negligence and carelessness.

The Trial Court did say, in speaking of the scope of this law, "However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workmen in performance of his work" (transcript, pp. 78, 79, fol. 134). But this was said of the requirements of the law itself. The measure of the master's responsibility in this case was charged to be something less, *i. e.* common law negligence of which the violation of this law was only evidence (see transcript, p. 79).

Moreover the charge required the jury to determine the negligence of the defendant in the matter of furnishing a proper plank, by the usual common law tests, whether reasonable inspection would have discovered the defect, and whether, under the circumstances, a test was customary and should have been used (transcript, pp. 79, 80).

The Court said (transcript, p. 80):

> "But the question for you to determine is, in the light of the conceded facts, in the light of the situation with respect to the disputed facts, as you understand them, and the circumstances and everything, *whether the defendant was negligent in permitting that plank to be used without a test.*" (Italics ours.)

In the light of these purely common law considerations actually submitted by the Trial Court we are surprised that counsel for the plaintiff-in-error contends that but for the application of this section of the Labor Law the Trial Court would have been compelled to dismiss the action.

We contend, therefore, that the duty of the master as defined in the statute and as charged by the Court, and as applied to the circumstances of this case is no different than prescribed by the maritime law. That the statute so far as it was applied to the case at bar was declaratory of the same duty existing at common law and maritime law.

The plaintiff-in-error contends, however, that but for the application of the statute this use of the plank would be considered at common law a detail of the work and ascribed to negligence of fellow servants rather than a breach of the master's duty.

If the duty to furnish for the use of the servant, this

plank, either considered as an appliance, or as materials, was cast upon this master, then of course it cannot be delegated to the servant, and the acts of the servants in using the plank cannot be considered details of the work or fellow servants' negligence.

There might conceivably be a case where the master had fulfilled his common law duty in furnishing for the use of his servants a quantity of suitable planks, upon the work, but a defective plank has been "selected" by fellow servants instead of the ones not defective, and used, and the contention could be made that the matter of "selection" was a detail of the work, and that the negligence of fellow servants was the proximate cause of the injury. If the circumstances were such that the contention was sound, and if this statute was so applied to the case that it enlarged the duty of the master, so that he nevertheless became responsible for the safety of the defective plank so selected and used, then there would be ground for the claim made here that by the application of the statute a common law defence was denied to the master.

If the situation is such that the master has, by the furnishing of sufficient and proper materials, or appliances or planks, performed his full common law duty in the matter, then, of course, at common law that would be the end of the matter.

If there had been involved in this action, the *construction* of a scaffold, including the selection of materials from proper material furnished, and involving the proper use and fastening and construction by fellow servants, and the scaffold became unsafe solely because of negligence of fellow-servants in respect of such work, and it appeared that the master had fully performed his common law duty of due care, then a condition might be

shown where a recovery would not be justified at common law, unmodified by this statute, and in that case the application of the statute might nevertheless make the master liable for the safety of the completed scaffold, and prevent the application of the so-called fellow-servant doctrine. That result might be brought about by the statutory requirement that the scaffold itself be a proper one, and the further requirement that it be "so placed and operated" as to give proper protection.

But there is nothing resembling such a situation in this case. This case involves only the furnishing of one plank by the master, and that a defective one, the defect therein being discoverable by inspection. The inspection by the boss rigger is the master's inspection, else there is no proof of any inspection by the master. The jury might find the inspection by the boss rigger for the master, inadequate. There was proof that a test was customary, and no test was used. The plank was a new one, not shown to have been selected for this use by the master with any initial care. It was not such a plank that because of prior use and inspection, reliance could reasonably be placed.

Upon such a state of facts the case was submitted to a jury, who were charged, in effect, that it was the duty of the master to furnish a plank proper to protect the servant, but that they must not only find that the duty was violated, but must find the existence of negligence, and must also find upon the question of inspection of the plank and necessity of and failure to use a test all in favor of the plaintiff below before a verdict could be found.

It is evidently some such situation as assumed *(supra)* that counsel for the plaintiff in error has in mind when he speaks of the picking up of this single plank on the ship, by the servant or his fellow as "selecting" the plank.

Such a situation only arises after the master has performed *his full duty*, because if the master's neglect in furnishing concurs with negligence of fellow servants in selection, then the accident may be ascribed to the fault of the master. (*Heiser* v. *Cincinnati Abattoir Co.*, 205 N. Y. 379; 98 N. E. 747.)

In *Maleeny* v. *Standard Shipbuilding Corporation* (237 N. Y. 250, 253-254) it is said, speaking of the circumstances in which the Labor Law under consideration works a modification of common law principles:

> "The principal modification of the common law is that the master is made liable even if the scaffold be *defectively constructed through* the negligence of fellow servants, he, *the master, having furnished proper material* (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Caddy v. Interborough R. T. Co.*, 195 N. Y. 415). (Italics ours.)

Butler v. *Townsend* (126 N. Y. 105) is one of the leading cases in the state relative to the common law duty of the master in the furnishing of a scaffold for his servants, and the head note reads: "A staging or scaffolding erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring a master to furnish to his servant a suitably safe place in which to do his work; it is an appliance or instrumentality by means of which the work is to be done."

A plank used in this staging broke, and in regard to this fact it is said:

> "It is true that the plank for the staging, under the customary rule, were to be and were furnished by the defendants, *but the evidence shows that an abundant supply of sound and suitable materials was so furnished, and that the particular plank which broke, had been examined and*

condemned and marked as unsafe, and that the sole negligence which occasioned the injury, was a careless selection of that plank by the lumpers.'' (Pages 109, 110. Italics ours.)

Then it is perfectly plain that before any alleged negligence of fellow servants in selecting or using defective material for a scaffold will be considered as the proximate cause of the accident, the master must be shown to have performed his entire duty in respect of the furnishing of the material. Moreover the use or selection of the material by fellow workmen must be a negligent use, not simply the fact of using the material furnished by the master.

POINT TWO

The statute in question (formerly sec. 18, Labor Law, now Sec. 240, Labor Law of the State of New York) was provable in this action.

In the City of Norwalk (55 Fed. 98, 105), the Court, after stating the implied grant to Congress of authority over the subject of maritime law, says:

> This view however does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike to land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any act of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its interna-

> tional and interstate relations. The long established doctrine in this field of 'border legislation' state laws are valid until Congress interposes and thereby further excludes state legislation."

The case itself involved the adoption by an admiralty court of the statute of a state creating a cause of action for death caused by negligence or tort, and the case cites many instances of "new legal rights" created by the states and directly affecting maritime matters alone, such as the creation of maritime liens, regulations as to rivers, harbors and fisheries, quarantine, floating elevators and ferries.

In the more recent case of *Southern Pacific Co.* v. *Jensen* (244 U. S. 205), a portion of the above excerpt was cited with approval, but the case held that the principles applied in Workmen's Compensation Law of the State of New York were of a character different from the principles of the maritime law, and unenforcible in Courts of Admiralty, and that the law was unconstitutional.

This case was followed by *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149), and recently by *State of Washington* v. *Dawson* (Adv. Opin. March 15th, 1924, page 339, Case No. 366). As these three last mentioned cases involved the consideration of Workmen's Compensation Acts, statutes of an entirely different character than the one presented in the case at bar, we cannot see that they indicate in the least what the opinion of the Court would be as to the statute involved here.

In *Grant and Smith Porter Co.* v. *Rohde* (257 U. S. 469), the servant was employed by his master in the building of ships, and was injured upon an unfinished ship lying on navigable water. The Court held that the workmen's compensation act of Oregon, to which both parties had assented, was applicable, and that a proceeding in admiralty to recover for personal injuries could not be sustained.

In *Western Fuel Company* v. *Garcia* (257 U. S. 233), it was held that a state statute giving a cause of action for death caused by a tort would be inforced in an admiralty court, when the death was caused by a maritime tort. Thus the maritime law was enlarged by a cause of action resting entirely upon a state statute, which statute created a liability upon an employer for causing death, which was not cast upon him by the maritime law. He was made to respond in damages for an act, and to a class of persons, beneficiaries, for which, and to whom the maritime law held him blameless. It was said to be a matter of local concern, and not to interfere with the proper harmony and uniformity of the law in its international and interstate aspects.

In the case at bar the modification of the maritime law by the statute in question, even the greatest modification that could be brought about under any circumstances by the application of the law, seems very much less than that permitted in the *Garcia* case.

In this case the statute in question seems to fall clearly within the permissible state legislation, as defined in the *City of Norwalk (supra)* and *Southern Pacific* v. *Jensen (supra)*. It is a matter of "purely local concern, which can be much better cared for under state authority, and which has always been thus cared for," it is "general legislation * * * applicable alike on land and water, passed in the exercise of the police power for the preservation of life and health, though incidentally affecting maritime matters." It certainly does not "contravene any act of Congress" and we think it is equally clear that it does not "work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." The very most that can be said in favor of the contention of the plaintiff in error,

is that under some circumstances it extends the responsibility of the master to a completed scaffold as a place of work, rather than to permit him to delegate the erection to servants, and makes the due performance of the duty the measure of the tort.

We have pointed out in our first point that this was not the result of the application of the statute to the circumstances of the case at bar. But even on the assumed result of the statute, can it be said that a reasonable enlargement of a master's duty as to place of work is such a change as works prejudice to characteristic features of the maritime law?

The statute does nothing more than to classify a completed scaffold as a place of work for the safety of which the master would be responsible at common law, whereas certain common law decisions in this state assumed to regard the scaffold as divided into component parts of materials and appliances, and to hold that the master could perform his entire duty in the furnishing of such materials and appliances (*Butler* v. *Townsend, supra*).

This view permitted the master to interpose the defence that a completed scaffold was unsafe, not because he had failed to furnish proper materials, but because of negligence in construction for which he was not responsible.

This principle then is not the fundamental principle of a master's liability for his own negligence, or his nonliability for the negligence of fellow servants. It is a *rule* for the application of these principles to particular situations. We are not prepared to admit that it is a universal rule of application adopted by the common law, and undoubtedly common law courts differ as to its applicability to situations, and undoubtedly admiralty courts would also differ.

In *Imbroveck* v. *Atlantic Transport Co.* (190 Fed. 229, 239, affd. 234 U. S. 52) the accident resulted from the failure of the stevedore, the master, to secure by wooden pins, furnished and at hand, certain of the hatch covers on the ship, thus rendering the place unsafe for the work. The contention was made by the stevedore that having furnished the necessary pins the failure to use them should be attributed to the negligence of fellow servants. The Court said that such a defence could not be interposed as against the ship, and as against the stevedore held that the accident would be attributed to the failure of the employer to furnish a safe place of work.

Counsel for the plaintiff-in-error shows by common law decisions in New York State, what he claims the rule to be before it was modified by statute (pages 27 and 28 of brief). He then assumes without citation or argument that this particular rule was part of the maritime law, and he claims that it is a "characteristic principle". The question then naturally arises as to how this particular rule, by which the master escaped liability for the safety of a completed scaffold, became a part of the maritime law. Whether it was a matter of independent growth along identical lines, or whether the maritime law adopted it from the common law of master and servant. If the latter is the fact then the plaintiff-in-error is resting his case upon the propriety and constitutionality of the adoption of that rule into maritime law, and at the same time the impropriety and unconstitutionality of the subsequent adoption of a modification of that rule.

The Courts of New York State hold that the statute, as applied in this case, has become a part of the common law of the state. That would not be true probably if the statute was made the basis of a so-called statutory action; it would not be true of an act like the Employer's Liability Act, which gave a new cause of action, nor of the

Workmen's Compensation Act. But it would seem that a law of the character of the statute involved here working a gradual modification of the common law, and alleviating what was considered a harsh rule of judicial decision, would, almost automatically, modify the maritime law to be applied by the State Court. We do not see any reason why this process of adoption should stop at the moment it became most favorable to the employer. It would seem as important that the maritime law be a matter of steady growth as that the common law should.

If by gradual change in judicial decisions this same change had been worked in the common law its adoption by the maritime law would follow without comment.

We cannot see that this change interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations. The relations in this action are simply those of a purely domestic employment, and not affecting shipping in any direct way. There is nothing in the record to show that the ship being repaired even was not in her home port.

This action was for tort, for a wrong, but whether a given act is wrong usually depends upon the local viewpoint. It depends upon local custom and conditions and local law to a large extent. It may be assumed that there are good reasons for such local laws. This is especially true in determining whether an act is a tort measured by the rule of negligence.

The case of *Frese* v. *Chicago Burlington and Quincy Railroad Company* (decided by this Court, Oct. 15th, 1923, Adv. Opin. Nov. 1st, 1923), was an action under the Federal Employer's Liability Act, for damages for causing the death of an engineer of the defendant, and it appeared that the deceased had violated a state statute of Missouri, which statute required him to bring his train

to a stop before crossing the tracks of another railroad, and to surely ascertain that no danger existed. The violation of the state statute prevented a recovery on the part of the next of kin, and it was held that the statute was applicable to determine the question of the contributory negligence of the deceased.

Counsel for the plaintiff-in-error relies on *Schwede* v. *Zenith Steamship Co.* (244 U. S. 646) mentioned on page 30 of his brief. This case is distinguished in the *Maleeny* case (*Maleeny* v. *Standard Shipbuilding Corporation,* 237 N. Y. 250) by the statement that Schwede was a seaman (p. 260). It also appears that the state employer's liability act created a statutory cause of action, and the Court held that it would not be inforced in an admiralty court.

POINT THREE

If the argument under our Point One is sound, and the maritime law has not been modified in this case, or modified in any substantial degree, then there is not presented a federal question, sufficient to justify the granting of a writ of error, and the writ should be dismissed, with costs.

POINT FOUR

If the writ of error is not dismissed, the judgment should be affirmed on the merits, with costs.

Respectfully submitted,

RALPH G. BARCLAY,
Counsel for the Defendant-in-error.